

No. 15535

United States
COURT OF APPEALS
for the Ninth Circuit

FLORENCE O'CAMPO,

Appellant,

v.

EDNA HARDISTY, PAUL H. WRIGHT, R.
V. RUSHFORD, N. P. HUGHES and N.
DRAKULICH,

Appellees.

*On Appeal from the Judgment of the United States
District Court for the District of Oregon.*

BRIEF FOR THE APPELLEES
Wright, Rushford, Hughes, Drakulich

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OPINION BELOW

The opinion (R. 12) of the District Court is reported
at 147 F.Supp. 850.

JURISDICTION

This appeal involves an action instituted in the Circuite Court of the State of Oregon for the County of Multnomah for damages from four Internal Revenue

Service employees and a former employee of plaintiff for an alleged conspiracy to ruin and destroy plaintiff's nursing home business. The four government employees were served individually on June 20, 1956, and thereafter on June 28, 1956, joined in removal of the case pursuant to 28 USC 1442 to the District Court of the United States for the District of Oregon. (R. 1-6). On July 6, 1956, within the time permitted under Rule 81(c) of the Federal Rules of Civil Procedure for answer or presentation of other defenses or objections, these defendants filed a motion to make more definite and certain. (R. 7). Also on July 6, 1956, a request for admission of facts by plaintiff, pursuant to Rule 36, F.R.C.P., was filed and served on behalf of the four Internal Revenue Service employees. (R. 8). Plaintiff failed to respond within the specified ten days and these defendants, on July 19, 1956, moved for summary judgment (R. 10), which after hearing was granted, and judgment entered November 12, 1956. (R. 13). Plaintiff's motion for rehearing (R. 14) was denied by order of December 27, 1956, (R. 15) and plaintiff filed notice of appeal on January 25, 1957. (R. 16). The jurisdiction of this Court is invoked under the provisions of 28 USC 1291.

QUESTION PRESENTED

Did the District Court err in granting summary judgment for defendants and finding the four Internal Revenue Service employees immune from suit because their actions were done in relation to, or more or less in connection with, the general matters committed by law to their control and supervision?

STATUTES INVOLVED

The pertinent statutes are set forth in the Appendix, *infra*.

STATEMENT

The following facts were deemed admitted under Rule 36, F.R.C.P. by plaintiff's failure to serve within the specified time (1) a sworn statement denying specifically the matters of which admissions were requested or setting forth in detail the reasons why she could not truthfully admit or deny those matters, or (2) written objections.

Before the commencement of this action and at all the times hereinafter mentioned, defendants other than Edna Hardisty, were and now are employees of the Internal Revenue Service of the United States of America, Paul H. Wright being Chief of Delinquent Accounts and Returns Branch, R. V. Rushford being a Group Supervisor, Norman P. Hughes being a Collection Officer, and Nick Drakulich being a Group Supervisor.

At all the times mentioned in said action, these defendants were acting solely under color of their respective offices and by authority of the Internal Revenue laws of the United States and all their acts in connection with the matters charged in plaintiff's complaint were committed by each of them under color of their respective offices.

Florence O'Campo, plaintiff, was indebted to the United States of America for withholding taxes for the

September and December 1951 and March, June, September and December 1955 quarterly periods, as follows:

WE	September	1951	\$111.74
WE	September	1951	188.89
WE	December	1951	69.93
WE	March	1955	335.84
WE	June	1955	171.06
WE	September	1955	296.31
WE	December	1955	348.13

together with interest and statutory penalties thereon.

Numerous conferences were held with plaintiff commencing in October 1952, with respect to the above-mentioned tax liabilities, but plaintiff failed and refused to satisfy said tax delinquencies until June 15, 1956.

On May 18, 1956, plaintiff was informed that distraint action was contemplated by the Internal Revenue Service unless the delinquent taxes were paid.

On June 14, 1956, the aforementioned delinquent taxes remained unpaid and a Notice of Seizure and Sale was served by the Internal Revenue Service, covering plaintiff's property at 10305 Southeast 82nd Avenue, Portland, Oregon. Plaintiff operated a rest home on said premises and a number of aged and bedridden patients were confined there. The premises were not padlocked by the Internal Revenue Agents.

On June 15, 1956, at 4:45 P.M. plaintiff appeared at the Internal Revenue Service office in Portland, Oregon, paid her delinquent taxes and thereafter certificates of release of federal tax liens were filed of record by the Internal Revenue Service.

The foregoing facts were set forth in the duly verified petition for removal (R. 1), and were included in the request for admission of facts. (R. 8).

SUMMARY OF ARGUMENT

This civil action commenced in the state court for damages from four Internal Revenue Service employees and another for an alleged conspiracy to destroy plaintiff's nursing home business, was properly removed by them to the District Court as an action against an officer of the United States or any agency thereof, or person acting under him, for acts under color of such office or on account of a right, title or authority claimed under an Act of Congress * * * * for the collection of the revenue.

Plaintiff admits that some of the things done by the four Internal Revenue Service employees were in connection with their acts as employees of the federal government, and that they were acting under color of their official duties.

Since the actions of the four Internal Revenue Service employees were done in relation to, or more or less in connection with, the general matters committed by law to their control and supervision, they are immune from personal liability.

ARGUMENT

The District Court's Finding and Conclusion — That the Actions of the Four Internal Revenue Service Employees Were Done in Relation to, or More or Less in Connection with, the General Matters Committed by Law to Their Control and Supervision and That Therefore They Were Immune from Suit — Was Supported by Record Evidence and, Accordingly, the Summary Judgment Should Be Affirmed.

A. Removal was proper.

Following removal of the case pursuant to 28 USC 1442 to the District Court (R. 1-6), and at the hearing on the motions for summary judgment (R. 10) and dismissal (R. 11) plaintiff's counsel questioned legality of the removal (Tr. 3-6), no formal motion to remand ever having been filed. In the statement of points upon which she intends to rely upon appeal (R. 21), appellant sets forth that "The Court erred in removing said cause", but appellant's brief contains no argument on this point, and cites no authorities for her position.

Plaintiff's complaint (R. 4), as filed in the state court, contained no allegations providing a basis for removal. The four Internal Revenue Service employees named defendants, however, stated generally in their duly verified petition for removal (R. 1) that they "were acting solely under color of their respective offices" and specifically facts showing that their actions in advising guardians and relatives of plaintiff's patients of the proposed seizure of the nursing home for failure to pay federal taxes were acts done under color of office.

The removal statute 28 USC 1442(a)(1) provides:

“A civil action * * * commenced in a state court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending: * * * Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress * * * for the collection of the revenue.”

In removing a case under the foregoing statute although the facts showing removability do not appear in the complaint, such facts may be supplied in the petition for removal. *Gay v. Ruff*, 292 U.S. 25.

Additionally, appellant admits (Br. 7) that “Appellees were acting under color of their official duties.”

B. Facts were admitted.

All the facts set forth in the petition for removal (R. 1) were also included in the request for admissions (R. 8) directed to plaintiff, and were deemed admitted under Rule 36, F.R.C.P., upon plaintiff's failure to respond thereto.

At the hearing on the motion for summary judgment plaintiff's counsel stated: “I concede, right to begin with, that in so far as any of the defendants was acting within the scope of his official duties as an employe of the Internal Revenue Department, in so far as any of those activities were pertinent to and a part of his official duties, we have no cause of action against either the defendant or the United States Government.” (Tr.

4). Again: "In so far as these employes lawfully attempted to, and did collect moneys owing to the Government, we have no cause of action, and we make no complaint." (Tr. 5). And on the argument of plaintiff's motion for rehearing plaintiff's counsel stated: "I will state right now that if I did not state it then, so far as that phase of it is concerned, I acknowledge, and acknowledge now, that some of the things that the defendants did—not all of them but some of them—were in connection with their acts as employes of the Government. I do not deny that at all." (Tr. 17).

Finally, even in appellant's brief, it is stated: "To clarify and confine the issues appellant will acknowledge — 1. Appellant was indebted to the Government for taxes. 2. The four male appellees were employees of the Internal Revenue Service at the time of the wrongful acts as set forth in the complaint. 3. Appellees were acting under color of their official duties. 4. The Government had the right through its employees to levy upon property of appellant to enforce the payment of her obligations to the Government." (Br. 7).

The record reflects that plaintiff ignored the request for admissions, while neither filing counter-affidavits nor appearing personally at the hearing on the motion for summary judgment. The docket entries (R. 25) show a studied indifference by plaintiff's counsel to raising objections by filing of appropriate papers in the District Court. Indeed, from the moment the removal papers were filed until the Court's opinion was filed, plaintiff's counsel did no more than present oral argument at the

hearing on the motions for summary judgment and dismissal.

C. Immunity from suit.

Since the actions of the four Internal Revenue Service employees were done in relation to, or more or less in connection with, the general matters committed by law to their control and supervision, they are immune from personal liability.

Cooper v. O'Connor, 99 F.2d 135, cert. denied 305 U.S. 643, rehearings denied 305 U.S. 673, 307 U.S. 651.

Spalding v. Vilas, 161 U.S. 483.

Gregoire v. Biddle, 177 F.2d 579 (C.A.2d), cert. denied 339 U.S. 949.

Tinkoff v. Campbell, et al., 86 F.Supp. 331 (D.C. Ill.).

CONCLUSION

The decision of the District Court is correct and should be affirmed.

Respectfully submitted,

C. E. LUCKEY,
United States Attorney for
the District of Oregon,

EDWARD J. GEORGEFF,
Assistant United States Attorney.

January 1958

APPENDIX

Title 28, U.S. Code

Section 1442. *Federal officers sued or prosecuted.*

(a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

* * * *